

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

BID FOR POSITION, LLC,

Plaintiff,

v.

AOL LLC and GOOGLE INC.,

Defendants.

CASE NO. 2:07-cv-582 JBF/TEM

Jury Trial Demanded

**DEFENDANTS' MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO FILE
UNDER SEAL CERTAIN EXHIBITS TO THE DECLARATION OF EMILY C.
O'BRIEN AND PORTIONS OF THE REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS GOOGLE AND AOL'S MOTION FOR SUMMARY JUDGMENT OF
NON-INFRINGEMENT OF U.S. PATENT NO. 7,225,151**

Pursuant to Local Civ. R. 5 and the Agreed Protective Order ("Protective Order") entered by the Court on April 28, 2008, Defendants Google Inc. and AOL LLC ("Defendants") by counsel, move for leave to file under seal certain exhibits, including Exhibits 2-4 to the Declaration of Emily C. O'Brien (collectively, "Confidential Exhibits") and portions of the Reply Memorandum in Support of Defendants Google and AOL's Motion for Summary Judgment of Non-Infringement of U.S. Patent No. 7,225,151 ("Portions of the Reply in Support"). In support of this Motion, Defendants state as follows:

1. Paragraph 23 of the Protective Order entered in this case states:
 - a. In the event a party wishes to use Protected Information, or any papers containing or making reference to the contents of such Protected Information, in any pleading or document filed with the Court in this litigation, such pleading or document and Protected Information shall be filed under seal, until such time as the Court orders or otherwise denies permission to file under seal, and such Protected Information, or papers, shall plainly state on the first page of any bound or stapled document "Confidential—Filed Under Seal" and shall be filed only in

sealed envelopes on which shall be endorsed the caption of this action and a statement substantially in the following form:

CONFIDENTIAL

This envelope contains documents that are subject to a Stipulation and Protective Order Governing Discovery Material entered by the Court in this action. This envelope shall neither be opened nor the contents revealed except by Order of the Court.

- b. Whenever a party files a document under seal with the Court, that party shall simultaneously file a motion requesting that the Court enter an order permitting the document to remain under seal. When such a motion is filed, the following steps must be taken:
 - i. The Clerk shall provide public notice by docketing the motion in a way that discloses its nature as a motion to seal, with a hearing date (if any);
 - ii. The Clerk shall provide interested persons an opportunity to submit memoranda in support of or in opposition to the motion;
 - iii. The document and any confidential memoranda shall be treated as sealed pending a ruling on the motion;
 - iv. If the Court decides to seal the documents at issue, it must state its reasons on the record, supported by specific findings; and
 - v. The Court must state its reasons for rejecting alternatives to closure.

Defendants agrees to follow in an expeditious manner any additional procedures imposed by the Court, including Local Rule 5 of the Local Rules of Practice for the United States District Court for the Eastern District of Virginia as a prerequisite to filing any document under seal. If the Court declines to allow the material to remain under seal, the materials shall not be unsealed until at least 10 days notice has been to the producing party to allow for the retrieval of any designated information prior to any papers being unsealed.

- 2. As the Confidential Exhibits and Portions of the Reply in Support contain and/or refer to information that is “Confidential Attorneys’ Eyes Only” (Prosecution Bar) or “Confidential Attorneys’ Eyes Only” under the Protective Order, Defendants seek permission to file the Confidential Exhibits and Portions of the Reply in Support under seal.

3. The Confidential Exhibits and Portions of the Reply in Support contain information and testimony containing sensitive and valuable proprietary information relating, among other things, to the technical details of how certain Google and AOL systems operate and certain expert contentions in this matter. Because this information is confidential by operation of the Protective Order, Defendants seek permission to file the Confidential Exhibits and Portions of the Reply in Support under seal. Failing to file the Confidential Exhibits and Portions of the Reply in Support under seal may risk the disclosure of confidential, trade secret information, would violate the Protective Order and potentially would cause competitive harm.

4. Defendants have sent copies of the Confidential Exhibits and Reply in Support to opposing counsel. *In-camera* copies of the same will be sent to the Court as well.

5. Before this Court may seal Court documents, it must: “(1) provide public notice of the request to seal an allowance to the parties a reasonable opportunity to object; (2) consider less drastic alternatives to sealing the documents; and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives.” *Ashcraft v. Connoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000). (Internal citations omitted.)

6. In compliance with Local Rule 5 of the Rules of this Court and *Ashcraft*, Defendants have attached a Public Notice of Defendants’ Motion to Seal along with a proposed Order.

7. Defendants request that the Court retain sealed materials until forty-five (45) days after a final order is entered and request that unless the case is appealed that any sealed materials be returned to counsel for the filing parties.

WHEREFORE, based on the foregoing, Defendants respectfully request this Motion be GRANTED and that the Confidential Exhibits and Portions of the Reply in Support be filed under seal as set forth in the Proposed Order attached as **Exhibit 1**.

Dated: August 11, 2008

Respectfully submitted,

/s/

Stephen E. Noona

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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